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## **WHAT WOULD PROPOSITION 54 MEAN FOR THE STATE'S ABILITY TO COLLECT AND USE DATA?**

Proposition 54, the Classification by Race, Ethnicity, Color, or National Origin (CRECNO) Initiative, will appear on the October 7, 2003 ballot. Proposition 54 amends the state Constitution to prohibit the state or local governments from "classifying" individuals by race, ethnicity, or national origin for any purpose not covered by a specific exemption. Ward Connerly sponsored Proposition 54.

The following analysis examines the potential impact of Proposition 54 on data collection and use. The California Budget Project (CBP) neither supports nor opposes this measure. This analysis is designed to highlight the impact of Proposition 54 and policy questions raised by this measure to help voters make informed policy choices.

### **WHAT DOES PROPOSITION 54 DO?**

Proposition 54 prohibits the state and local governments from classifying individuals by race, ethnicity, or national origin for any purpose other than those outlined in the initiative. Specifically, Proposition 54:

- Prohibits the state from classifying any individual by race, ethnicity, color or national origin in the operation of public education, public contracting, and public employment;
- Prohibits the state from classifying any individual by race, ethnicity, color or national origin in the operation of any other state operations; however, the Legislature could override this prohibition by a two-thirds vote and with the approval of the Governor;
- Defines "classifying" by race, ethnicity, color or national origin as the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms;
- Defines the "state" as, but not limited to, the state itself, any city, county, city and county, public university system, including the University of California (UC), California State University (CSU), community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state; and
- Would take effect on January 1, 2005.

Proposition 54 contains several exemptions from the prohibitions outlined above, including:

- Activities of the Department of Fair Employment and Housing, which would be exempt for a period ending January 1, 2015;
- "Otherwise lawful classification of medical research subjects and patients;"
- Actions by law enforcement officers, who would be allowed to describe individuals in "otherwise lawful ways" while carrying out their law enforcement duties;

- “Otherwise lawful” assignment of prisoners and undercover law enforcement personnel;
- Actions taken due to requirements of federal law, or needed to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state; and
- Actions required by any valid consent decree or court order which is in force as of January 1, 2005.

Proposition 54 does not affect collection or use of data classifying individuals by gender or by primary language.

Currently, the state asks, but does not require, individuals to identify their race and/or ethnicity on a variety of forms and for a variety of purposes.

## **HOW DOES THE STATE USE AND COLLECT DATA?**

The state engages in a vast array of data collection activities and data is used throughout state government for purposes ranging from compliance with federal civil rights laws to program evaluation to research to policy analysis.<sup>1</sup> There is no comprehensive list of data resources maintained by the state, much less by local governments, or the UC and CSU systems. Examples of the types of state-collected data classified by race and ethnicity include:

- Demographic data describing students enrolled in K – 12 education;
- Demographic data characterizing participants in state programs, such as Medi-Cal, CalWORKs, and Child Welfare Services; and
- Survey data gathered as part of research efforts. The California Health Interview Survey (CHIS), for example, gathers information on the health status of Californians, including information on certain diseases and chronic conditions, health coverage and lack of coverage, eligibility for and participation in Medi-Cal and the Healthy Families programs; and the health and health needs of Californians of different racial and ethnic groups.

Applicants for employment with the state are asked their age, gender, ethnicity, and whether they are disabled and/or a veteran or spouse of a deceased or disabled veteran. Similar questions are asked of applicants for admission to the UC or CSU.

## **HOW WOULD PROPOSITION 54 AFFECT STATE DATA COLLECTION AND USE?**

The potential impact of Proposition 54 is difficult to estimate. As noted above, the state collects data in innumerable places and the use of data classified by race and ethnicity is even more widespread. As will be discussed below, a number of the provisions of Proposition 54 lack precise detail, such as the definition of “medical and patient research.” Even where definitions are clear, such as the inclusion of the UC and CSU as entities prohibited from “classifying” based on race and ethnicity, it is unclear whether Proposition 54’s limitations would apply to the research activities of faculty and staff.

In order to assess the potential impact of Proposition 54 on state data collection and use, the CBP examined current practices with respect to data collection and use in several key policy areas. The results of this research suggest that:

- Much of the data collected by the state would be covered by the exemptions provided by Proposition 54. For example, federal requirements cover a significant fraction, but by no means all, of the educa-

tion data collected by the state, and some, but not all, of the health-related data would potentially be covered by the exemption for medical and patient research.

- However, Proposition 54 would significantly limit the state's ability to **use** data that could lawfully be collected. Proposition 54 could potentially limit the use of data collected as a requirement of eligibility for federal funds for purposes other than meeting federal reporting purposes. For example, the state would potentially be prohibited from using student test score data for evaluating the effectiveness of curricula for teaching students of different racial or ethnic groups, or from making school and district-level test score data available by race and ethnicity on state web sites for use by researchers outside of state government.
- The lack of precise definitions for the types of activities that might qualify for the medical and patient research exemption leaves the status of much of the state's health data collection and use in doubt. Proposition 54 does not define "otherwise lawful classification of medical research subjects and patients." The status of data related to the use of medical services and population-based health research is particularly in doubt.

### CRITICAL QUESTIONS: DEFINITIONS, EXEMPTIONS, AND OTHER GRAY AREAS

The impact of Proposition 54 will depend on the interpretations of many of the definitions and exemptions contained in the measure. Because of the controversy surrounding the measure, the resolution of many of the ambiguities in the measure and clarification of poorly defined provisions will probably be left to the courts. Some of the more important 'gray areas' include:

***The breadth of the definition of "classification."*** Proposition 54 defines "classification" as "the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms." Controversy over the scope of this exemption is likely, since prohibited activities are "not limited to" those specified in the text and Proposition 54 contains no additional guidance or definition of the types of activities that would be prohibited. In particular, the extent to which Proposition 54 would prohibit the use of data is uncertain. The types of questions that are likely to arise include:

- Could the state continue to use data sorted by race and ethnicity that is collected by the federal government, such as federal Census data? For example, could the State Department of Housing and Community Development use federal Census data or data collected by the federal Department of Housing and Urban Development to identify housing disparities and monitor local governments' compliance with local housing element laws?
- Could the state use data collected under one of the measure's exemptions for non-exempt purposes? For example, could the state use data required by the federal No Child Left Behind Act on student performance, race, and ethnicity to evaluate the effectiveness of alternative curricula at boosting the performance of students of different racial and ethnic groups?
- Would the use of data collected in response to federal requirements be limited to complying with federal law? Could, for example, the state continue to make student performance data available on the State Department of Education's website?

***The breadth of the definition of the “state.”*** Proposition 54 defines “the state” as including “but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the UC and CSU, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.” One of the most critical issues that arises from the measure’s definition of the “state” and “any other state operations” is the status of research conducted by the faculty and staff of the UC and CSU systems.

Proposition 54 clearly prohibits public institutions of higher education from collecting racial and ethnic admissions data. However, the extent to which the measure will limit faculty research is an important question. While the CRECNO defines the university as part of the “state,” an entity prohibited from “classifying” racial and ethnic data, a memorandum from the Office of the General Counsel of the Regents of the University of California argues that :

“Faculty members are expected to carry out research as part of their faculty duties and are considered to be acting in the course and scope of their employment when they do so... Faculty members make their own determinations about what research to pursue...about what use to make of their research, when and where, and even whether to publish.” Furthermore, Counsel argues that since “faculty research is a highly focused and personal process, typically with no plan for any particular use by the University of the results ...all of these facts suggest that faculty members act independently, and not as ‘the University’ when performing their research...Counsel concludes that “Given the arguments on both sides of this issue, it is difficult to predict whether a court would consider individual faculty researchers to be ‘the state’ for purposes of the Initiative.”<sup>2</sup>

Finally, Counsel notes that the initiative may be interpreted as inconsistent with academic freedom as protected by the First Amendment and may “raise a serious question as to the constitutionality of the Initiative...”<sup>3</sup>

The proponents of Proposition 54 appear to concur with this interpretation. The proponents’ website includes an analysis that states as follows:

“Are faculty members ‘the University of California’ for purposes of the initiative when they conduct research?

No. This measure is clearly addressed at government agencies at all levels of the state and local government system in California. Although members of the faculty are clearly employees of the University, and have access to University resources, they do not exercise any governmental power or authority. They cannot compel the collection of the data, nor can they use the data to grant or deny admission to the University, a contract with the University, or a job with the University.”<sup>4</sup>

While Proposition 54 may not affect faculty research, the measure may affect non-faculty researchers, support staff such as computer specialists, and other ancillary personnel. It is also unclear how Proposition 54 might affect student researchers who receive university paychecks. As with other provisions, this question will likely be clarified through litigation if voters approve Proposition 54. Ambiguity over this issue may affect researchers’ choice of projects, e.g. if faculty choose to avoid particular topics due to the potential for litigation. Similarly, Proposition 54 could discourage some students from enrolling in, or faculty or staff from accepting employment with, the CSU or UC.

The considerations raised by both proponents and opponents would not, presumably, apply to state workers outside of the universities, such as scientists employed by environmental agencies or researchers employed by the Department of Health Services.

Finally, the measure does not define “other governmental instrumentalities,” which are treated as part of the state for purposes of the prohibition on “classification.” It is unclear, for example, whether this term would affect activities of private organizations that receive state support.

***The impact of the Legislature’s override authority.*** The Legislature’s authority to exempt certain activities applies to only a fraction of the activities affected by Proposition 54. The measure prohibits the collection of racial and ethnic data in public education, public contracting, public employment, and any other state operation. The measure allows the Legislature to authorize classification of individuals by race, ethnicity, color, or national origin by a two-thirds vote, with the concurrence of the governor. However, this exemption applies only to “any other state operation,” and not to public education, public contracting, or public employment. Thus, the Legislature could not, for example, vote to exempt continued collection of data on the race and ethnicity of prospective students applying to the UC. That prohibition is absolute. While this provision provides relatively broad authority to the Legislature, the required two-thirds approval of the Legislature may be difficult to achieve in practice.

***The impact of exemptions for specific data collection activities and agencies.*** A number of exemptions allow continued collection and use of data on race and ethnicity. Specifically:

- **Department of Fair Employment and Housing.** Proposition 54 exempts data collected by the Department of Fair Employment and Housing until January 1, 2015. After that date, the Department would be subject to the measure’s general prohibitions. During the period of the exemption, the Department is prohibited from imputing race, color, ethnicity, or national origin to any individual. In other words, the Department would be prohibited from identifying a person’s race or ethnicity based on surname, appearance, or other factor if that person does not voluntarily provide their race or ethnicity. The Department of Fair Housing and Employment currently receives federal funds to investigate claims of housing discrimination. If this funding continues, the Department would be allowed to continue some data collection on an ongoing basis.
- **Medical and patient research.** The measure exempts “otherwise lawful classification of medical research subjects and patients...” However, Proposition 54 provides no definition of what constitutes medical research. Proponents of Proposition 54 state that, “Public health experiments that call for **volunteer subjects** of a certain racial background should not be prohibited from classifying those individuals for analysis” (emphasis added).<sup>5</sup> Critics counter that the proponents have carefully restricted the exemption to research that involves volunteer subjects and that such a definition would exclude most environmental, epidemiological, and other population-based research, as well as research that links data from patient records to survey data (for example, studies that link reports of the prevalence of a disease or health condition to population data to analyze differential rates of health conditions by race and ethnicity). It is also unclear, for example, whether the exemption would apply to the state’s collection of hospital discharge data, which includes the condition for which a patient was hospitalized; surveys of health behavior, such as smoking; or collection and analysis of data pertaining to individuals’ access to health coverage, such as rates of insurance coverage or use of medical services.

The controversy over the breadth of this exemption would likely result in litigation if Proposition 54 is passed by the voters. The outcome of this litigation could have significant implications for a variety of state population-based health research efforts.

- **Law enforcement.** Proposition 54 exempts activities that law enforcement officers engage in “while carrying out their law enforcement duties...” However, it also prohibits the Governor, Legislature, and state agencies from requiring law enforcement agencies to track individuals by race and ethnicity. The measure does not define “law enforcement duties” and, as a result, the breadth and potential impact of this exemption is difficult to assess. The Legislative Analyst, for example, notes that it is unclear whether local law enforcement agencies would be allowed to analyze crime trends by race.<sup>6</sup> Moreover, Proposition 54 prohibits the Governor, Legislature, and any state agency from requiring law enforcement officers to maintain records tracking individuals by race and ethnicity, and prohibits the state from withholding funding from law enforcement agencies for failing to maintain such records. Finally, Proposition 54 would exempt assignment of prisoners and undercover law enforcement officials based on race and ethnicity from the measure’s restrictions.
- **Federally required data:** Proposition 54 exempts data collected to “comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.” Federal law requires a substantial fraction of the state’s current data collection activities. For example, the federal No Child Left Behind Act requires states to collect and submit data on student performance by race and ethnicity. Federal law also requires states to submit data on the race and ethnicity of participants in a number of health and human service programs that receive federal funds, including Medi-Cal and Child Welfare Services.<sup>7</sup>

This exemption allows continued collection of data covered by a variety of federal statutes and data that is required as a condition of federal funding. However, it is unclear whether data required by federal law could be used for purposes other than fulfilling federal reporting requirements. In particular, it is unclear whether the state could make federally required data available to the public, such as the “user friendly” databases that currently provide public access to education and other datasets. The interpretation of this exemption will have a significant impact on data use across state government. Nonetheless, this exemption, while it has its own gray areas, is perhaps the most clear in terms of its range of application.

- **Consent decrees and court orders.** Proposition 54 would not apply to data collection required by consent decrees or court orders. This provision would, for example, allow police departments in Los Angeles, Oakland, and San Jose to continue to collect data on the race and ethnicity of suspects while the orders remain in effect.

## HOW MIGHT PROPOSITION 54 AFFECT THE BUDGET?

According to the Legislative Analyst’s Office (LAO), which prepares the official estimate of the fiscal impact of ballot measures, Proposition 54 would not result in a significant fiscal impact on state and local governments.

A precise assessment of the measure’s cost is impossible due to the large number of ambiguities outlined above. Fiscal considerations related to Proposition 54 include:

- Whether the state will experience costs or savings attributable to modifying state databases, survey protocols, and web sites; costs related to litigation over the measure's impact are also a consideration.
- Whether Proposition 54 could result in the loss of non-federal funds. While the measure exempts data collection and use necessary to prevent the loss of federal funds, this exemption does not apply to activities required as a condition of non-federal funds. For example, a background memo for the Regents of the University of California states that while the UC does not preferentially award financial aid based on race or ethnicity, Proposition 54 could require the University to forgo private dollars targeted on this basis, thus reducing the total pool of aid available.<sup>8</sup> Similarly, the University receives support from private corporations, foundations, and individuals to support research projects. Proposition 54 could affect the continued receipt of these funds.<sup>9</sup>
- The impact on program costs, if researchers are unable to consider race and ethnicity when examining program effectiveness.

## **WILL PROPOSITION 54 END THE PRACTICE OF ASKING INDIVIDUALS TO PROVIDE THEIR RACE AND ETHNICITY?**

Proponents of Proposition 54 argue "the state should not be asking people about their race."<sup>10</sup> They argue, "Race should become a private matter that is no business of government's. Think how refreshing it would be to throw out the entire system of checking little boxes."<sup>11</sup>

Opponents note that Proposition 54 would not affect many instances where individuals are asked to provide their race and ethnicity. Nonetheless, the measure could significantly limit data collection and public access to data. For example, the most detailed data on race and ethnicity comes from the US Census Bureau. Since the federal government conducts the Census, Proposition 54 would not affect it. The measure may, however, prohibit state employees from using Census data classified by race and/or ethnicity for research, policy analysis, or program evaluation. Similarly, requirements of the federal No Child Left Behind Act would require school districts to continue to collect data on the race and ethnicity of students and report this information to the federal government. Proposition 54 could, however, potentially prohibit the state from making this information available on state web sites or from using it to guide policy deliberations or program evaluation.

## **CONCLUSION**

Proposition 54 would have a significant, but in many areas, unknown impact on the collection and use of data by all levels of government within California. Many of the measure's most significant provisions leave key questions unanswered, from whether the state could use lawfully collected data for purposes unrelated to the purpose generating the exemption to the scope of the medical research exemption. While Proposition 54 allows the Legislature to exempt some types of classification by a two-thirds vote and with the concurrence of the Governor, the Legislature could not authorize continued classification in the area of public education, public contracting, or public employment. Thus, while the Legislature could authorize continued data collection and use in the area of health or child welfare, it could not authorize collection of data on students in public schools, unless federal law requires that information.

Policy questions for voters to consider when evaluating Proposition 54 include:

- Does the state's collection and use of voluntarily provided data on race and ethnicity offer social, public health and research benefits?
- Would Proposition 54 limit the state's ability to evaluate the effectiveness of public programs or identify disparities in the availability of public programs and services?
- Would Proposition 54 limit the ability of faculty and staff at the UC and CSU to engage in research?
- Would Proposition 54 limit or prevent public access to all data that is collected by the state?

## ENDNOTES

<sup>1</sup> Unless stated otherwise, this paper uses the term "state" as it is defined in the initiative to include the state government, cities, counties, special districts of or within the state, school districts, community colleges, the University of California and California State University systems, and any other political subdivision or government instrumentality.

<sup>2</sup> Office of the General Counsel, Regents of the University of California, *Re: Classification by Race, Ethnicity, Color, or National Origin Initiative*, May 1, 2003, pp. 6-7.

<sup>3</sup> Office of the General Counsel, Regents of the University of California, *Re: Classification by Race, Ethnicity, Color, or National Origin Initiative*, May 1, 2003, pp. 9-10.

<sup>4</sup> Racial Privacy Initiative, Proposition 54, *Legal Analysis* downloaded from <http://www.racialprivacy.org/legal.htm> on July 27, 2003.

<sup>5</sup> Racial Privacy Initiative, Proposition 54, *FAQs* downloaded from <http://www.racialprivacy.org/faqs.htm#e> on August 4, 2003.

<sup>6</sup> Legislative Analyst's Office, *Proposition 54: Classification by Race, Ethnicity, Color, or National Origin*, downloaded from [http://www.lao.ca.gov/initiatives/2003/54\\_10\\_2003.htm](http://www.lao.ca.gov/initiatives/2003/54_10_2003.htm) on August 11, 2003.

<sup>7</sup> Not all federal programs include such requirements. For example, states are not required to submit data on the race and ethnicity of individuals participating in programs supported by Temporary Assistance for Needy Families (TANF) dollars. Proposition 54 would presumably prohibit the state from including race and ethnicity in surveys of program participants.

<sup>8</sup> Office of the President of the University of California, *Proposal to Oppose California State Ballot Initiative; CRECNO* (May 1, 2003), p. 12.

<sup>9</sup> Office of the President of the University of California, *Proposal to Oppose California State Ballot Initiative; CRECNO* (May 1, 2003), p. 4.

<sup>10</sup> Racial Privacy Initiative, Proposition 54, *FAQs* downloaded from <http://www.racialprivacy.org/faqs.htm#a> downloaded on July 31, 2003.

<sup>11</sup> Racial Privacy Initiative, Proposition 54, downloaded from <http://www.racialprivacy.org/index.htm> downloaded on August 9, 2003.

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*Jean Ross prepared this brief. The California Budget Project (CBP) was founded in 1994 to provide Californians with a source of timely, objective, and accessible expertise on state fiscal and economic policy issues. The CBP engages in independent fiscal and policy analysis and public education with the goal of improving public policies affecting the economic and social well-being of low- and middle-income Californians. Support for the CBP comes from foundation grants, publications and individual contributions. Please visit the CBP's web site at [www.cbp.org](http://www.cbp.org).*

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